Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-940

EDWARD P. ZEMPRELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

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Gerald C. Paris
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IN THE
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No.

EDWARD P. ZEMPRELLI,
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v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner, Edward P. Zemprelli, prays for a Writ of Certiorari to review the order of the United States Court of Appeals for the Third Circuit entered on December 7, 1976.

OPINIONS BELOW

The Order of the Court of Appeals for the Third Circuit granted respondent's motion to dismiss

petitioner's appeal for lack of jurisdiction, citing Cobbledick v. United States, 309 U.S. 323, 324-26 (1940), and United States v. Ryan, 402 U.S. 530, 532-33 (1971). (Appendix A, p. 1a). The order of the United States District Court for the Western District of Pennsylvania from which petitioner had appealed is dated November 18, 1976. (Appendix B, p. 2a).

JURISDICTION

The order of the Court of Appeals for the Third Circuit was entered on December 7, 1976. A timely petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether it is appropriate to require a State Senator of the Commonwealth of Pennsylvania and an officer of the court to place himself in a posture of disobeying an order of court merely to trigger the procedural mechanisms for review of a ruling.

2. Whether petitioner's rights under the United States Constitution and the laws of the United States are violated by the refusal of the court to permit petitioner's counsel to have access to the transcript of petitioner's testimony before a prior grand jury, after having permitted petitioner such access.

STATEMENT OF CASE

Petitioner is a prominent attorney of Pittsburgh, Pennsylvania, and a duly elected member of the Senate of the Commonwealth of Pennsylvania. In December, 1974, petitioner testified before a grand jury in Pittsburgh, Pennsylvania, which is no longer in session. That defunct grand jury returned indictments for perjury against one of petitioner's clients, who was subsequently convicted of perjury before the United States District Court for the Western District of Pennsylvania in October, 1976. During the October trial for perjury, the federal prosecutor asserted to the jury that petitioner had been involved in his client's decision to testify falsely before the December, 1974 grand jury.

Petitioner was served with a subpoena to testify on November 12, 1976, before the grand jury from the Clerk for the United States District Court for the Western District of Pennsylvania on November 11, 1976. (Appendix C, p. 4a). The federal prosecutor filed an Affidavit on December 29, 1976, in which he delineated the following reasons for subpoenaing petitioner to appear before the current grand jury in Pittsburgh, Pennsylvania:

"It is essential and necessary to the aforesaid grand jury investigation that Edward P. Zemprelli appear and testify before the Grand Jury. Such testimony is essential and necessary to establish the relationship between Edward P. Zemprelli, Francis P. 'Red' Long, John Hackett as it relates to conspiracy to obstruct justice (18 U.S.C. §371), obstruction of justice (18 U.S.C. §1503), perjury (18 U.S.C. §1623) and subornation of perjury (18 U.S.C. §1622).

"Such testimony is essential and necessary further to establish whether or not Edward P. Zemprelli has received monies and other things of value by virtue of his position as State Senator for the Commonwealth of Pennsylvania in violation of Title 18, United States Code, Sections 1951 and 1952.

"Such testimony is further essential and necessary to establish the relationships between Edward P. Zemprelli, and certain banking interests and institutions and others related thereto to determine whether or not there have been violations of Title 18, United States Code, Sections 1951 and 1952."

(Appendix D, pp. 5a-7a).

In this Affidavit, respondent further noted that "the government has not denied witness' protestations, made through counsel, during court proceedings relating to the witness' grand jury appearances, that he could be a potential defendant in this grand jury investigation." (Appendix D, p. 6a).

Petitioner's appearance before the grand jury was postponed at the request of petitioner's counsel until November 17, 1976. Prior to his scheduled appearance before the grand jury, petitioner requested that the federal prosecutor make available a copy of the transcript of petitioner's testimony before the grand jury in December, 1974. When this request was refused, petitioner applied to the United States District Court for the Western District of Pennsylvania for a copy of the transcript of his testimony which had been given before the prior grand jury of December, 1974. On November 18, 1976, after a hearing, the Honorable Louis Rosenberg, Judge of the United States District Court for the Western District of Pennsylvania, ruled that petitioner was entitled to review the transcript of his prior testimony given before the grand jury in December, 1974, but that requirements of secrecy prevented petitioner's counsel from reviewing said transcript although petitioner was permitted to make notes of that testimony and disclose them to counsel.

On November 19, 1976, petitioner appealed the District Judge's ruling to the Court of Appeals for the Third Circuit, and respondent moved to dismiss it. That motion was granted by the Court of Appeals for the Third Circuit on December 7, 1976. (Appendix A, p. 1a).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH UNITED STATES V. NIXON, 418 U.S. 683 (1974).

The provisions of 28 U.S.C. § 1291 refer to "final decisions of the district court." That finality requirement is calculated to expedite ongoing judicial proceedings. Cobbledick v. United States, 309 U.S. 323, 324-26 (1940). In furtherance of that goal of finality, this Court has held that an order relating to a grand jury proceeding is not final until the person from whom information is sought chooses to resist an order seeking it. The Court has

> "consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal."
>
> United States v. Ryan, 402 U.S. 530, 533 (1971).

A determination that an order is final, however, is a difficult task requiring the careful evaluation and balancing of the inconvenience of piecemeal review against the dangers of injustice which

could result from refusing immediate review. Certain exceptions have, therefore, been carved from the general requirement of being placed in a posture of contempt. In Perlman v. United States, 247 U.S. 7 (1918), the Court reviewed the district court's order requiring production of certain exhibits, even though no one had refused production and had submitted himself to contempt. "The [Perlman] Court held an order compelling production was appealable because it was unlikely that the third party would risk a contempt citation in order to allow immediate review of appellant's claim of privilege." United States v. Nixon, 318 U.S. 683, 691 (1974). Had the Perlman Court not reviewed the lower court's order immediately, any review whatsoever of the appellant's claim would have been unlikely.

Another exception to the general requirement of submitting to contempt in order to obtain review was enumerated by the Court in United States v. Nixon, supra. In that case, the President moved to quash a third-party subpoena duces tecum, which had directed him to produce certain materials for use at a pending criminal trial. Although he did not follow the traditional route to appeal by refusing to submit the items thereby placing himself in a posture of contempt, the Court held that the finality requirement

did not preclude review and that the District Court's order denying the motion to quash was appealable. The Court said

> "Here too, the traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises. To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government. Similarly, a federal judge should not be placed in the posture of issuing a citation to a President simply in order to invoke review. The issue whether a President can be cited for contempt could itself engender protracted litigation, and would further delay both review on the merits of his claim of privilege and the ultimate termination of the underlying criminal action for which his evidence is sought. These considerations lead us to conclude that the order of the District Court was an appealable order. The appeal from that order was therefore properly 'in' the Court of Appeals, and the case is not properly before this Court on the writ of certiorari before judgment."
>
> Id., at 691-92.

In other words, the dangers which could result from refusing immediate review outweighed the inconvenience of allowing the appeal. It was unseemly to require the President to disobey an order of court simply to activate the procedural mechanisms for review. It was equally inappropriate to place a federal judge in the position of issuing such a contempt citation to the President simply in order to trip the mechanism. To avoid a constitutional confrontation between the executive and judicial branches of government was appropriate under the circumstances.

As in United States v. Nixon, supra, the factual setting of this case makes it inappropriate to require petitioner to place himself in a posture of disobeying an order of court simply in order to activate the procedural mechanisms for appellate review. Petitioner is a member of the Senate of the Commonwealth of Pennsylvania, a member of the Bar, and, accordingly, an officer of the court. Upon admission to these positions, petitioner swore to uphold the laws of the United States and to conduct himself in a respectful manner when appearing before its institutions. It is, therefore, untenable to require him to disobey an order of court for the mere sake of procedural mechanics. Likewise, it is inappropriate to place a federal judge in the position of holding petitioner in contempt merely to permit him appellate review.

As in United States v. Nixon, supra, to require petitioner, who is a member of the Senate of the Commonwealth of Pennsylvania, to place himself in a position of contempt needlessly invites a constitutional confrontation between the federal government and the Commonwealth of Pennsylvania. A contempt citation resulting in confinement could conceivably interfere with petitioner's performance as a Senator for the Commonwealth of Pennsylvania so as to undermine the representation of his constituents before that state body. Indeed, it could conceivably interfere with the privilege attaching to petitioner's attendance at the sessions of the Senate of the Commonwealth of Pennsylvania. See PENNA. CONST., Art. II, § 15. Rather than inviting confrontations between the federal and the state governments, immediate review would avoid such conflicts, which could, by themselves, lead to protraction of a decision on the merits of the basic issue concerning petitioner's constitutional right to have counsel read petitioner's prior testimony.

The requirement that petitioner submit to contempt in order to obtain review of the primary issue results in the further injustice that petitioner, who is an officer of the court and a member of the Pennsylvania Senate, might well be induced to forego

review of the constitutional issue and testify before the grand jury without the effective assistance of his counsel, rather than willfully offend the court's dignity as well as suffer the public humiliation and disgrace of being held in contempt before the very eyes of his constituents. Petitioner's exercise of the right to have the basic constitutional issue of this case decided on appeal would thereby be violated or at least chilled by virtue of his position as an attorney and an elected official. If, rather than risk a contempt citation in order to obtain review of the denial of counsel's assistance, a grand jury witness is forced to testify without counsel's help, his constitutional rights would be effectively violated as a result of a procedural mechanism. This dilemma conflicts with United States v. Nixon and justifies the grant of certiorari to review the order below.

2. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE APPROPRIATE PROCEDURE TO OBTAIN REVIEW

The Court of Appeals for the Third Circuit granted respondent's motion to dismiss for lack of jurisdiction and cited Cobbledick v. United States, 309 U.S. 323 (1940), and United States v. Ryan, 402 U.S. 530 (1971), in support thereof. (Appendix A, p.

1a). In relying on these two opinions, the Court of Appeals for the Third Circuit has taken the position that an individual must invariably place himself in a posture of contempt in order to obtain appellate review. That position, however, conflicts with the position of the Court of Appeals for the Fourth Circuit in United States v. Hemphill, 369 F. 2d 539 (4th Cir. 1966). In Hemphill, the Secretary of Labor had commenced a proceeding in the United States District Court for the District of South Carolina against certain defendants for alleged failures to pay minimum and overtime wages to some employees. The Secretary objected to certain interrogatories which had been drafted by defendants on a claim of privilege, but the District Court overruled the objection. Although the Secretary did not await a contempt citation, the Court of Appeals for the Fourth Circuit held that an alternative to submission to a contempt order ought to be available. Accordingly, that court reviewed the decision below via a petition for writ of mandamus. The Court of Appeals for the Fourth Circuit said:

> "To compel the Secretary to appear in the District Court in response to the order to show cause why he should not be held in contempt would not provide an adequate legal remedy. If he should appear and should be held in contempt, the order holding him in contempt would be an appealable order permitting appellate review in this Court. Meanwhile, however, the Secretary would have been subject to sanctions in the District Court, including possible imprisonment. Despite the comparative promptness with which orders for release on bail or stays may be obtained, that is hardly an appropriate or adequate means for obtaining appellate review of a pre-trial order of dubious validity, or one that was clearly erroneous as we hold this one to have been."

Id., at 543.

The Hemphill court continued,

> "We hold instead that any litigant, private individual or public official, is entitled to a writ of mandamus to avoid an appearance to show cause why he should not be held in contempt of court when the underlying order of the Court is clearly erroneous and the refusal to comply with it has been both formal and respectful.
>
> * * *
>
> "When a pretrial order is clearly erroneous, an appellate corrective ought to be available if compliance with the order would work a substantial and irreparable deprivation or if the only alternative is submission to a contempt order."

Id.

The only course which the Court of Appeals for the Third Circuit and the respondent would give

to petitioner is his submission to a contempt order, despite the availability of appellate review at the present juncture. That position represents a conflict in principle with the position of the Court of Appeals for the Fourth Circuit as reflected in United States v. Hemphill, supra, and such a conflict justifies the grant of certiorari to review the decision below.

3. THE UNDERLYING DECISION OF THE DISTRICT COURT IS ERRONEOUS

Although the District Court ordered that petitioner was permitted to read the transcript of his prior testimony before the grand jury in December, 1974, the District Court ruled that considerations of secrecy precluded it from allowing petitioner's counsel to review the same transcript. Denying counsel access to petitioner's prior grand jury testimony violates petitioner's right against self-incrimination and his right to due process under the Fifth Amendment. This Court has steadfastly maintained that unhindered advice from counsel is essential to the effective exercise of a person's right against self-incrimination. United States v. Mandujano, _____, U.S. _____, 965 S. Ct. 1768 (1976); Maness v. Meyers, 419 U.S. 449 (1975). To deny petitioner the right to have his counsel review such a document under these circumstances renders nugatory the critical role of

the Fifth Amendment privilege.

The District Court's decision to preclude petitioner's counsel from reviewing the transcript deprives counsel of facts essential to effective assistance and denies petitioner due process under the law. As the Court recognized in Powell v. Alabama, 287 U.S. 45 (1932), effective assistance of counsel in any case, civil or criminal, includes giving such counsel an adequate opportunity to learn the facts on which the effective representation of the party litigating depend. Indeed, this principle has been reaffirmed by the court in Chandler v. Fretag, 348 U.S. 3 (1954), and in Reynolds v. Cochran, 365 U.S. 525 (1961).

Furthermore, the District Court's denial of counsel's access to the transcript is in derogation of petitioner's right to have assistance of counsel in connection with the instant grand jury proceedings under 28 U.S.C. § 1654. It exceeds the limitations imposed by Rule 6(e) of the Federal Rules of Criminal Procedure in that "[n]o obligation of secrecy may be imposed upon any person except in accordance with this rule." It is also inconsistent with the goals and purposes of Rule 16(a) of the Federal Rules of Criminal Procedure.

The clear error of the District Court's decision also justifies the grant of certiorari to review it.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the order of the Court of Appeals for the Third Circuit.

Respectfully submitted,

GILBERT J. HELWIG
GERALD C. PARIS
ARTHUR H. STROYD, JR.
JOSEPH E. CAMP
REED SMITH SHAW & McCLAY

747 Union Trust Building
Pittsburgh, Pennsylvania 15219

Counsel for Petitioner

Date: January 5, 1977

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

November 19, 1976
No. 76-2507

IN RE: GRAND JURY PROCEEDINGS
SUBPOENA OF EDWARD P. ZEMPRELLI,

Edward P. Zemprelli, Appellant

(D. C. Misc. No. 6631)

Present: SEITZ, Chief Judge, and VAN DUSEN and ADAMS, Circuit Judges.

1. Appellee's motion to dismiss appeal for lack of jurisdiction

2. Appellant's ANSWER TO MOTION TO DISMISS APPEAL, filed 11/23/76

in the above-entitled case.

Respectfully,

Clerk

enc.
fm

The foregoing Motion is granted. See Cobbledick v. United States, 309 U.S. 323, 324-26 (1940), which was cited with approval in United States v. Ryan, 402 U.S. 530, 532-33 (1971).

By the Court,

/s/ Van Dusen
Judge

Dated: December 7, 1976

IN THE UNITED DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

IN RE GRAND JURY PROCEEDINGS	)	
	)	Misc. No. 6631
SUBPOENA OF EDWARD P. ZEMPRELLI	)	

ORDER

Upon consideration of the motion of Edward P. Zemprelli for an order requiring that a copy of the transcript of his testimony before a Grand Jury in this District in December, 1974, be made available to him and to his counsel for their review prior to his being required to appear before a Grand Jury presently sitting in this District, and after hearing counsel with respect to such motion,

It is ordered, adjudged and decreed:

1. The motion that the witness Zemprelli be allowed to review the transcript of his testimony is granted; and

2. The motion that the counsel for the witness be permitted to review the transcript is denied, without prejudice, however, to the right of the wit-

ness to make such notes of the aforesaid testimony as the witness desires, and to disclose these notes to his counsel.

/s/ Louis Rosenberg
J.

November 18th, 1976

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF PENNSYLVANIA

To Edward P. Zemprelli
1244 Bickerton Street, Sylvania Heights
Clairton, PA
or
528 St. Clair Avenue
Clairton, PA

You are hereby commanded to appear in the United States District Court for the Western District of Pennsylvania at 708 U.S. Post Office in the city of Pittsburgh on the 12th day of November 1976 at 10 o'clock A.M. to testify before the Grand Jury.

This subpoena is issued on application of the United States of America.
JAMES E. ROARK
Assistant U.S. Attorney
633 U.S. Post Office & Courthouse
Pittsburgh, Pa. 15219 /s/ Gilbert W. Conley
Clerk

Dated: November 4, 1976
By
Deputy Clerk

IN THE UNITED STATES COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:)
GRAND JURY PROCEEDINGS) Misc. No. 6631
EDWARD P. ZEMPRELLI,)
Witness

AFFIDAVIT

James E. Roark, Assistant United States Attorney, Western District of Pennsylvania, being duly sworn, states as follows:

1. On December 13, 1976, counsel for Edward P. Zemprelli, by letter, requested "that in connection with [these] proceedings, [the Government] prepare for submission to the Court an affidavit of purpose (See Schofield I, 486 F.2d 85; In re Grand Jury Proceedings - Bruno, 3d Cir. Oct. 21, 1976) . . ."

2. The September 23, 1975, Grand Jury of the United States District Court for the Western District of Pennsylvania is now conducting investigations of various alleged illegal activities in the Western District of Pennsylvania. Investigations being conducted by the aforementioned Grand Jury involve possible violations of federal criminal statutes, including but not limited to Title 18, United States Code, Sections 371 (conspiracy), 1622 (subornation of

perjury), 1623 (false declarations), 1503 (obstruction of justice), 1951 (Hobbs Act) and 1952 (Interstate Transportation in Aid of Racketeering -bribery/extortion).

3. Edward P. Zemprelli has been twice subpoenaed by the aforesaid Grand Jury and the government has not denied witness' protestations, made through counsel, during court proceedings relating to the witness' grand jury appearances, that he could be a potential defendant in this grand jury investigation.

4. It is essential and necessary to the aforesaid grand jury investigation that Edward P. Zemprelli appear and testify before the Grand Jury. Such testimony is essential and necessary to establish the relationship between Edward P. Zemprelli, Francis P. "Red" Long, John Hackett as it relates to conspiracy to obstruct justice (18 U.S.C. §371), obstruction of justice (18 U.S.C. §1503), perjury (18 U.S.C. §1623) and subornation of perjury (18 U.S.C. §1622).

5. Such testimony is essential and necessary further to establish whether or not Edward P. Zemprelli has received monies and other things of value by virtue of his position as State Senator for the Commonwealth of Pennsylvania in violation of Title 18, United States Code, Sections 1951 and 1952.

6. Such testimony is further essential and necessary to establish the relationships between

Edward P. Zemprelli, and certain banking interests and institutions and others related thereto to determine whether or not there have been violations of Title 18, United States Code, Sections 1951 and 1952.

JAMES E. ROARK
Assistant U.S. Attorney

Sworn and subscribed to this

_____ day of _____, 197__.

DEPUTY CLERK
U.S. DISTRICT COURT
FOR WESTERN DISTRICT OF
PENNSYLVANIA